No. 87-1758

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

MEYERS INDUSTRIES, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

and

KENNETH P. PRILL,
Respondents.

PETITIONER'S REPLY TO BRIEF OF RESPONDENT NLRB IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT NLRB FAILS TO DISCERN THAT ITS OWN RETREAT FROM ITS MEYERS I STANDARD OF CONCERTED ACTIVITY POSES A THREAT TO NON-UNION EMPLOYERS AND THE STATUTORY UNDERPINNING ESTABLISHED IN CITY DISPOSAL

The National Labor Relations Board in presenting the opposition to the petition does not take issue with Petitioner's premise that in NLRB v. City Disposal Systems, 465 U.S. 822, 831 (1984), this Court reserved for future decision whether and to what extent, the meaning of "concerted

activity" in the non-union context, requires that "particular actions of an individual employee must be linked to the actions of fellow employees in order to permit it to be said that the individual is engaged in concerted activity." The Court did suggest that the Board's application of its "expertise might permit it to do otherwise" in cases involving employees working under union contracts.

1. Although the Board admits in its opposition that its decision in Meyers II was "accepted, as the law of the case," Opp. at 6, it cannot show that the District of Columbia Circuit's decision will not undermine its Meyers I decision inasmuch as that circuit is presently the forum for a considerable number of cases sought to be reviewed under the Labor Management Relations Act, 29 U.S.C. §159(f). Unless the matter is settled in this case, the Board will likely be unable

to apply its Meyers I decision at all, simply because the District of Columbia Circuit will always have jurisdiction over the Board in these cases.

Contrary to the Board's observation that petitioner "does not actually challenge the judgment of the court of appeals," Opp. at 8, petitioner indeed does. In essence, the decision Meyers Industries, Inc. must challenge is the Prill I decision of the court of appeals that rejected the Board's ruling that "concerted activity" requires the action of two workers or the contemplation thereof. As set out in the petition, Meyers Industries, Inc. unsuccessfully attempted review of the court of appeals remand decision in Prill I, No. 85-463 (1985). Certiorari was presumably denied by this Court at that time because the issue was not yet ripe for review, as Mr. Prill argued in his opposition to that petition.

Moreover, respondent Prill does not now take issue with the instant petition and has not filed a brief in opposition to it.[1]

2. As set out in the petition also, the decision below is inconsistent with the Fourth Circuit's decision in Krispy Kreme Doughnut Corp. v. NLRB, 635 F.2d 304, 310 (4th Cir. 1980), holding that the requirement of "concerted activity" is a

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[1]The Board suggests that petitioner "may not complain" about the judgment below on the basis of California v. Rooney, 107 S.Ct. 2852 (1987). In that case, certiorari was filed from a decision of the California Court of Appeals without a ruling on a particular legal issue, but relying on other grounds to support the trial court. This Court found in that situation, "[a]s it stands, we have no way of knowing what the California Supreme Court's position on the issue of trash searches currently is." 107 S.Ct. at 2855. The Court therefore declined to rule on the matter in the first instance. In the instant case, however, there is no such need to predict what the District of Columbia Circuit will do in future cases, as its opinions in this case plainly express its judgment in the matter. California v. Rooney simply presents a legal issue that was not reviewed; a much different case than the one at bar.

"jurisdictional requirement" for Board action. Similarly, the four dissenters of this Court in City Disposal noted the predicate nature of the "concerted activity" requirement for Board action, when "an unfair labor practice is properly filed, which requires a determination whether 'concerted activity' is involved in the first instance." 465 U.S. at 845 n.5. The majority opinion implicitly recognized this distinction also when it noted that "[o]f course, at some point an individual employee's actions may become so remotely related to the activities of fellow employees that it cannot reasonably be said that the employee is engaged in concerted activity." 465 U.S. 833 n.10.

Since the court of appeals has expressly disagreed that the definition of "concerted activities" in Meyers I was mandated by the language of Section 7, its decision conflicts with the rationale

carefully invoked by the Court in upholding the Board's position in City Disposal.

3. Furthermore, the Board's opposition brief here does not track the language used by the Board in its Meyers I decision, which in itself reflects a movement away from that watershed decision. Rather than pointing "to no evidence that the Board in fact contemplates any future changes in its definition," Opp. at 10, both in Darling, Inc., 287 N.L.R.B. No. 148, 127 L.R.R.M. 1241, (1988) and Every Woman's Place, 282 N.L.R.B. No. 48, 124 L.R.R.M. 1001, (1986), the Board has begun to implement such changes.

In Darling, Inc., the Board noted that its "Meyers I definition represents a logical and reasonable reading of the statute and not that any other definition was necessarily and finally precluded." Slip. Op. at 3; 127 L.R.R.M. at 1242. In

Every Woman's Place, the Board found an individual employee's complaint to the U.S. Department of Labor, after two others had also questioned their employer about its overtime policy, was "sufficiently linked to group activity to constitute 'concerted activity'" because "[t]he call was a logical outgrowth of the original protest by all the employees." 124 L.R.R.M. at 1001. As Chairman Dotson clearly illustrated in his dissent in Every Woman's Place, the majority decision does in fact return the Board to the Alleluia Cushion standard, roundly rejected by the courts of appeal, as the record shows that the employee questioning of the employer in the case was in fact not done jointly.

> Under Meyers, such questioning is not concerted. As the Board emphasized in that decision, "individual employee concern, even if openly manifested by several employees on an individual basis, is not sufficient evidence to prove concert of action."

124 L.R.R.M. at 1002 (emphasis in original).

> In my opinion the majority, without regard to what the General Counsel has in fact established or failed to establish, finds concertedness by applying the Alleluia presumption that individual actions regarding "group concerns" are concerted--the very legal fiction that the Board intended to eliminate in its Meyers decision. The continued attempt to create legal fictions--here a so-called "logical outgrowth"--as functional substitutes for evidence of employees' actual behavior in the workplace contributes little to realistic analysis and again turns the Board into an ombudsman for the remedy of every injustice in the workplace. Such a role is not contemplated by the statute.

124 L.R.R.M. at 1003 (footnotes omitted).

Clearly, if the Chairman of the Board can adduce a change in the Board's willingness to follow the Meyers I decision, petitioner's argument that the change is in fact occurring, demonstrates that the matter needs to be settled by this Court and is not an argument based upon mere speculation.

The Board's decision now at bar is an

important public order that because of its very nature is likely to escape review unless the Court hears the case now, Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 122 (1974), for "the short-term nature of the action makes the issues presented here 'capable of repetition, yet evading review.'" If the Board persists in treating non-union employment cases in a "flexible" manner to find "concerted action," it will pose an inordinate problem of predictability to the 83% of the workforce employers which are non-union. Moreover, the Board's departure from Meyers I also will undermine the very nature of "concerted activity" painstakenly examined by this Court in City Disposal, causing considerable problems for the lower courts which can be foreclosed now.

CONCLUSION

For the reasons stated above and in the Petition, a writ of certiorari should issue to review the decision of the District of Columbia Court.

Respectfully submitted,

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